

1 Ramon Rossi Lopez (admitted *pro hac vice*)
2 (CA Bar No. 86361)
3 LOPEZ McHUGH LLP
4 100 Bayview Circle, Suite 5600
5 Newport Beach, California 92660
6 rlopez@lopezmchugh.com

7 Mark S. O'Connor (011029)
8 GALLAGHER & KENNEDY, P.A.
9 2575 East Camelback Road
10 Phoenix, Arizona 85016-9225
11 Telephone: (602) 530-8000
12 mark.oconnor@gknet.com

13 *Attorneys for Plaintiffs*

14 James R. Condo (#005867)
15 Amanda C. Sheridan (#027360)
16 SNELL & WILMER L.L.P.
17 One Arizona Center
18 400 E. Van Buren, Suite 1900
19 Phoenix, Arizona 85004-2202
20 Telephone: 602.382.6000
21 Facsimile: 602.382.6070
22 jcondo@swlaw.com
23 asheridan@swlaw.com

24 Richard B. North, Jr. (admitted *pro hac vice*)
25 Georgia Bar No. 545599
26 Matthew B. Lerner (admitted *pro hac vice*)
27 Georgia Bar No. 446986
28 NELSON MULLINS RILEY &
SCARBOROUGH LLP
201 17th Street, NW / Suite 1700
Atlanta, GA 30363
Telephone: (404) 322-6000
Telephone: (602) 382-6000
richard.north@nelsonmullins.com
matthew.lerner@nelsonmullins.com

*Attorneys for Defendants C. R. Bard, Inc. and
Bard Peripheral Vascular, Inc.*

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability
Litigation,

No. 2:15-MD-02641-DGC

**THE PARTIES' JOINT STATUS
REPORT FOR THE OCTOBER 5,
2017 CASE MANAGEMENT
CONFERENCE**

1 In accordance with Paragraph F of Case Management Order No. 26 [Doc. 6799],
 2 the Parties hereby submit their Joint Status Report for the July 13, 2017 Case
 3 Management Conference.

4 **I. Discovery**

5 A. MDL Common Discovery

6 The Parties completed MDL common discovery on February 3, 2017. The
 7 following depositions have been completed:

8	December 15, 2015	30(b)(6) re FDA Warning Letter
9	January 11, 2016	Kay Fuller
10	January 20, 2016	Continued 30(b)(6) re FDA Warning Letter
11	March 18, 2016	30(b)(6) re corporate structure
12	April 27, 2016	30(b)(6) re ESI systems structure
13	May 3, 2016	Murray Asch, M.D.
14	May 11, 2016	Carol Vierling
15	May 17, 2016	Anne Bynon
16	May 24, 2016	Len DeCant
17	June 2, 2016	John DeFord
18	June 9, 2016	Bret Baird
19	June 16, 2016	Robert DeLeon
20	June 17, 2016	Joe DeJohn
21	July 18, 2016	Abithal Raji-Kubba
22	July 27, 2016	Bill Little
23	July 27, 2016	Judy Ludwig
24	July 29, 2016	John Wheeler
25	August 9, 2016	Maureen Uebelacker
26	August 16, 2016	Daniel Orms
27	August 19, 2016	Mary Edwards
28	August 24, 2016	Cindi Walcott

1	August 30, 2016	30(b)(6) re REACH program
2	September 7, 2016	Steve Williamson
3	September 7, 2016	30(b)(6) re Sales/Marketing
4	September 7, 2016	Kevin Shifrin
5	September 16, 2016	Jack Sullivan
6	September 19, 2016	Brian Doherty
7	September 23, 2016	Holly Glass
8	September 29, 2016	John Van Vleet
9	October 11, 2016	Chris Ganser
10	October 18, 2016	Natalie Wong
11	November 3, 2016	Jack Sullivan (continued)
12	November 11, 2016	Robert Cortelezzi
13	December 6, 2016	David Peeler, M.D.
14	January 4, 2017	John Kaufman, M.D.
15	January 18, 2017	Michael Randall - 30(b)(6) Meridian/Denali
16	January 18, 2017	Kim Romney
17	January 19, 2017	Robert Carr - 30(b)(6) Key Opinion Leaders
18	January 20, 2017	Scott Trerotola, M.D.
19	January 24, 2017	Scott Randall
20	January 25, 2017	Gary Cohen, M.D.
21	January 26, 2017	Chad Modra - 30(b)(6) Failure Rate Thresholds
22	January 26, 2017	Anthony Venbrux, M.D.
23	January 30, 2017	Frank Lynch, M.D.
24	January 31, 2017	Mark Wilson
25	February 1, 2017	William Stavropoulos, M.D.
26	February 2, 2017	Mike Randall
27	February 2, 2017	Kevin Boyle
28	June 6, 2017	Rob Carr (Preemption Declaration)

1 B. MDL Expert Disclosure and Discovery

2 Plaintiffs made their initial disclosures of expert witnesses on March 3, 2017, and
3 their initial disclosures relating to the Meridian and Denali devices on April 7, 2017.

4 Those disclosures included the following witnesses:

5 David W. Bates, M.D., MSc

6 Rebecca Betensky, Ph.D.

7 Mark J. Eisenberg, M.D.

8 David Garcia, M.D.

9 Steven M. Hertz, M.D.

10 Sanjeeva Kalva M.D.

11 David A. Kessler, M.D.

12 Thomas Kinney, M.D., M.S.M.E.

13 Robert M. McMeeking, Ph.D., NAE, FREng, FRSE, LFASME

14 Robert O. Ritchie, Ph.D.

15 Suzanne Parisian, M.D.

16 Anne Christine Roberts, M.D.

17 Michael B. Streiff, M.D.

18 Robert L. Vogelzang, M.D.

19 Defendants made their initial disclosures of expert witnesses on April 14, 2017,
20 and their initial disclosures relating to the Meridian and Denali devices on May 12, 2017.

21 Those disclosures included the following witnesses:

22 Christine L. Brauer, Ph.D.

23 Paul Briant, Ph.D., P.E.

24 Audrey A. Fasching, Ph.D., P.E.

25 David W. Feigal, Jr., M.D., M.P.H.

26 Clement J. Grassi, M.D.

27 Mark W. Moritz, M.D.

28 Christopher S. Morris, M.D.

1 Frederick B. Rogers, M.D., FACS

2 Moni Stein, M.D., FSIR

3 Ronald A. Thisted, Ph.D.

4 Donna Bea Tillman, Ph.D., M.P.A.

5 Plaintiffs made their rebuttal disclosures of expert witnesses on May 12, 2017.

6 Those disclosures included the following witnesses:

7 Rebecca Betensky, Ph.D.

8 Kush Desai, M.D.

9 Mark J. Eisenberg, M.D.

10 Steven M. Hertz, M.D.

11 Robert M. McMeeking, Ph.D.

12 Robert O. Ritchie, Ph.D.

13 Robert L. Vogelzang, M.D.

14 The following expert depositions have been taken:

15 May 9, 2017 David W. Bates, M.D., MSc (class-action)

16 May 16, 2017 Steven M. Hertz, M.D. (class-action)

17 May 17, 2017 Christopher S. Morris, M.D.

18 June 5, 2017 Robert L. Vogelzang, M.D.

19 June 6, 2017 Kush Desai, M.D.

20 June 9, 2017 Robert O. Ritchie, Ph.D.

21 June 15, 2017 Clement J. Grassi, M.D.

22 June 17, 2017 Thomas Kinney, M.D., M.S., M.E.

23 June 21, 2017 David L. Garcia, M.D.

24 June 21, 2017 Suzanne Parisian, M.D.

25 June 21, 2017 Anne Christine Roberts, M.D.

26 June 23, 2017 Rebecca Betensky, Ph.D.

27 June 26, 2017 Audrey Fasching, Ph.D., PE

28 July 6, 2017 Mark J. Eisenberg, M.D., MPH, FACC, FAHA

1	July 6, 2017	Robert M. McMeeking, Ph.D., NAE, FREng,
2		FRSE, LFASME
3	July 7, 2017	Anne Christine Roberts, M.D.
4	July 11, 2017	Sanjeeva Kalva, M.D.
5	July 12, 2017	Michael B. Streiff, M.D.
6	July 13, 2017	Paul Briant, Ph.D, PE
7	July 18, 2017	Mark W. Moritz, M.D.
8	July 18, 2017	Frederick B. Rogers, M.D., MS, FACS
9	July 20, 2017	David W. Feigal, Jr., M.D., MPH
10	July 21, 2017	Dr. Darren R. Hurst
11	July 24, 2017	Dr. Derek D. Muehrcke
12	July 25, 2017	Christopher S. Morris, MD
13	July 26, 2017	J. Matthew Sims, MC, MS
14	July 26, 2017	Dr. Kenneth Herbst
15	July 28, 2017	Ronald A. Thisted, Ph.D.
16	July 31, 2017	David A. Kessler, M.D.
17	July 31, 2017	Moni Stein, MD
18	August 2, 2017	Christine L. Brauer, M.D., Ph.D.
19	August 3, 2017	Paul Briant, Ph.D., PE
20	August 3, 2017	Audrey Fasching, Ph.D.
21	August 3, 2017	David S. Poll, MD
22	August 4, 2017	Robert O. Ritchie, Ph.D.
23	August 4, 2017	Donna Bea Tillman, Ph.D.MPA, FRAPS
24	August 4, 2017	Lora K. White, RN, BSN, CNLCP, CCM,
25		MSCC
26	August 16, 2017	Lora K. White, RN, BSN, CCM, CNLCP
27	August 25, 2017	Dr. Daniel Cousin
28	September 29, 2017	Dr. Piotr Sobiesczyk

1
2 C. Barazza Class Action Discovery

3 The Parties completed the depositions of the named plaintiffs. The following
4 depositions were taken:

5	October 19, 2016	Diane Washington
6	October 28, 2016	James Holt
7	November 10, 2016	Gregory Lester
8	November 16, 2016	Maria Barazza
9	November 30, 2016	Edward Mims
10	December 1, 2016	Nancy Mosher
11	December 6, 2016	Thomas Flournay
12	December 6, 2016	Delmar Lee Peck
13	December 15, 2016	Denise Tomlin
14	January 24, 2017	John Van Vleet
15	February 27, 2017	Linda Walker
16	May 11, 2017	Ana Hernandez

17 The Parties designated and disclosed experts on class certification issues, including
18 Plaintiffs' rebuttal expert reports. Many of those class certification experts were also the
19 same experts in the general MDL and were deposed at the same time for both the MDL
20 and the class action.

21 D. Bellwether Group 1 Depositions

22 1. Fact Discovery

23 In addition to the numerous fact witness depositions taken by the Parties before the
24 last status conference, the Parties have scheduled or have already taken the following fact
25 witness depositions in the five bellwether cases since that status conference:

26	May 31, 2017	Angelic Thompson (Mulkey)
27	May 31, 2017	Lorelie Thompson (Mulkey)
28	May 31, 2017	Torin Walters, M.D. (Mulkey)

1	June 1, 2017	Pho Nguyen, M.D. (Mulkey)
2	June 15, 2017	Brandon Kang, M.D. (Booker)
3	June 20, 2017	Richard Harvey, M.D. (Booker).
4	June 26, 2017	Eric Hairston (Booker)
5	June 27, 2017	Brody Puckett (Kruse, postponed due to illness)
6	July 7, 2017	Amy Sparks, M.D. (Hyde)
7	July 11, 2017	Colleen Taylor, M.D. (Jones)
8	July 12, 2017	Aaron Donner (Mulkey)
9	August 3, 2017	Chris Smith (Jones)
10	August 15, 2017	Bryan Vogel (Booker and Kruse)
11	August 23, 2017	Tim Hug (Hyde)

12 Per CMO 25 (Doc. 6227), the deadline for deposing medical witnesses (treating
 13 physicians) was August 7, 2017, and the deadline for deposing all other fact witnesses was
 14 August 15, 2017. Those depositions have been completed, with the exception of Dr.
 15 Sobieszczyk (a case-specific medical expert in Booker), whose deposition had to be
 16 rescheduled to September 29 due to conflicts and the impact of Hurricane Harvey.

17 2. Case-Specific Expert Disclosures and Discovery

18 On June 5, 2017, Plaintiffs disclosed case-specific expert reports by the following
 19 expert witnesses in all five bellwether cases:

20 Darren Hurst, M.D.

21 Derek D. Muehrcke, M.D.

22 On June 5, 2107, Plaintiffs disclosed the case-specific expert report of David
 23 Garcia, M.D. in the Jones bellwether case.

24 On June 9, 2017, in accordance with the agreement of the Parties, Plaintiffs
 25 disclosed case-specific expert reports by Robert M. McMeeking, Ph.D., NAE, FREng,
 26 FRSE, LFASME in all five bellwether cases.

27

28

1 On June 12, 2017, in accordance with the agreement of the Parties, Plaintiffs
2 disclosed case-specific expert reports by the following expert witnesses in all five
3 bellwether cases:

4 Robert O. Ritchie, Ph.D.

5 J. Matthew Sims, MC, MS & Lora K. White, RN, BSN, CNLCP, CCM,
6 MSCC

7 On July 3, 2017, Defendants disclosed case-specific expert reports for the
8 following expert witnesses:

9 Kenneth D. Herbst, M.D.

10 Mark W. Moritz, M.D.

11 Christopher S. Morris, M.D.

12 Moni Stein, M.D., FSIR

13 On July 13, 2017, in accordance with agreement of the parties, Defendants
14 disclosed case-specific expert reports for the following expert witnesses:

15 Audrey A. Fasching, Ph.D.

16 Paul Briant, Ph.D

17 Daniel Cousin, M.D.

18 David Poll, M.D.

19 Piotr Sobieszczyk, M.D.

20 With the exception of the September 29th deposition of Dr. Sobieszczyk (noted
21 above), all general MDL deposition discovery and all depositions related to the initial five
22 bellwether cases has been completed (subject to this Court's resolution of the disputes
23 identified below).

24 **II. Science Day Proposed Procedure**

25 The Parties will be prepared to make their Science Day presentations on October 5,
26 2019.

1 **III. Bellwether Trials Issues**

2 In paragraph H of CMO 26, the Court advised the Parties that it will, at the
3 upcoming status conference, address the scheduling of bellwether trials. The Court also
4 asked the Parties to be prepared to address at the status conference and to address in this
5 submission the issues of enlisting other judges as part of the bellwether process. The
6 parties note their respective positions on those issues below.

7 **Plaintiffs' Position**

8 Plaintiffs will be prepared to discuss with the Court issues relating to the setting of
9 the bellwether cases for trial. With respect to the Court's suggestion as to the enlistment
10 of other judges to try some of the bellwether cases, Plaintiffs believe that it is important to
11 get the bellwether cases tried in as expedient a manner as reasonably possible. To that
12 end, Plaintiffs believe that this Court should try at least the first two bellwether cases in
13 order to address issues that may come up in subsequent trials. At that point, Plaintiffs are
14 amenable to the involvement of other judges to try some of the remaining bellwether cases
15 in order to get the trials scheduled and completed in 2018.

16 **Defendants' Position**

17 Defendants will be prepared to discuss possible trial settings with the Court at the
18 upcoming status conference. Defendants are also open to the possibility of enlisting
19 visiting judges to try some of the MDL bellwether cases. However, given the two-years
20 of institutional knowledge that the Court has developed regarding these cases, Defendants
21 would propose that, if possible, this Court schedule three 3-week trials in 2018 or early
22 2019 and that this Court try those cases. The Court's ruling on evidentiary, trial issues,
23 and motions in *limines* could then provide guidance to the parties and future Courts on
24 similar issues and would likely result in significant increased efficiencies for the parties
25 and other Courts in preparing for and trying subsequent bellwether cases.

26 **IV. Defendants' Motion for Summary Judgment on Preemption**

27 Defendants filed a motion for summary judgment based on preemption on March
28 24, 2017 [Doc. 5397]. Plaintiffs filed their response brief on September 1, 2017 [Doc.

1 7369]. The Parties' filed a Joint Motion to Extend Daubert Response and Reply Brief
 2 Page Limits and Extend Deadline to File Reply Brief to Motion for Summary Judgment
 3 on Preemption and Motion to Seal [Doc. 7332]. If granted, the Defendants' Reply Brief
 4 will be due on September 28, 2017. At that point, briefing on the motion will be
 5 complete.

6 The Parties would like to discuss whether the Court desires oral argument on the
 7 motion, and if so, the scheduling of that argument.

8 **V. Summary Judgment and Daubert Motions**

9 The Parties have filed their *Daubert* and summary judgment motions in accordance
 10 with CMO 23 and this Court's August 31, 2017, Order [Doc. 7368] extending the
 11 deadlines for filings such motions. The Parties would like to discuss whether the Court
 12 desires oral argument on those motions, and if so, the scheduling and organization of
 13 those arguments.

14 **VI. Disputes Related to Defendants' Discovery from Plaintiffs' Experts**

15 At the July 13 Status Hearing, the Court addressed the issue of discoverability of
 16 communications among the plaintiffs' experts who jointly wrote Rule 26 Reports (Drs.
 17 Kinney, Roberts, and Kalva; Drs. Garcia and Streiff; and Drs. Vogelzang, Desai, Resnick,
 18 and Lewandowski). On July 17, the Court entered Case Management Order No. 26, which
 19 provides that "Plaintiffs shall produce communications among their experts to Defendants.
 20 If Plaintiffs conclude that any such communications are properly withheld, they shall
 21 provide Defendants with a privilege log that identifies the specific basis on which Plaintiffs'
 22 conclude that the communications are protected under Rule 26(b)."

23 **Plaintiffs' Position:**

24 Following the July 13, 2017, Case Management Conference, Plaintiffs reviewed all
 25 relevant communications involving the identified experts. Those communications
 26 included emails from Plaintiffs' attorneys to the experts, communications from the experts
 27 to the attorneys, and communications between the experts themselves. In some cases, the
 28 communications from expert to expert(s) included attorneys as copyees (CCs).

1 Pursuant to Federal Rule of Civil Procedure 26(b)(4)(C)(i)-(iii), Plaintiffs produced
2 all communications between the attorneys and experts that relate to (i) compensation for
3 the experts, (ii) the identification of facts or data provided by the attorneys and the
4 expert(s) considered in forming opinions, and (iii) the identification of assumptions
5 provided by the attorneys and on which the expert(s) relied in forming opinions. Plaintiffs
6 did not produce any communications from attorneys to experts that did not fall within
7 Rule 26(b)(4)(C)(i)-(iii); nor did Plaintiffs produce any communications from experts to
8 attorneys that did not fall within 26(b)(4)(C)(i)-(iii). This included communications from
9 individual experts to an attorney or attorneys on which the expert included other experts
10 as copyees (CCs).

11 With the exception of a single communication, Plaintiffs produced every
12 communication from any expert to another expert (or experts) even if attorneys were
13 copied on those communications. The single communication exists within a string of
14 emails between experts; accordingly, Plaintiffs redacted that email from the longer chain
15 and included the email on a redaction log in which they identified the email, its
16 participants, and the basis for the redaction – which is that the experts were discussing
17 between themselves attorney work-product that had been provided to one of the experts.
18 [Plaintiffs address the basis for this privilege claim below.]

19 Prior to the production of the documents, Plaintiffs' counsel had a meet and confer
20 with Bard's counsel. In that meet and confer, Bard's counsel agreed that Plaintiffs did not
21 need to log attorney-to-expert and expert-to-attorney communications that were being
22 withheld pursuant to Rule 26(b)(4)(C). That agreement recognized that there is no reason
23 to do a document-by-document log for such communications because categorically they
24 are all protected under Rule 26(b)(4)(C). Accordingly, when Plaintiffs produced the
25 responsive expert communications, Plaintiffs did not include a log for attorney-to-expert
26 or expert-to-attorney communications. Plaintiffs produced logs for any redactions made
27 to produced documents because some of the email strings included both discoverable
28

1 communications, such as those under 26(b)(4)(C)(i)-(iii), and non-discoverable
2 communications.

3 At the July 13, 2017, Case Management Conference, Plaintiffs discussed the
4 possibility of five “buckets” of types of expert communications: (1) communications
5 between lawyers and experts protected under 26(b)(4)(C)(i)-(iii); (2) draft reports; (3)
6 communications between experts retained by the attorneys that convey work-product from
7 an attorney; (4) communications between joint experts that is effectively a draft of their
8 report; and (5) other communications between experts. Plaintiffs have produced all
9 category 5 documents; there are no category 4 documents; and Plaintiffs identified one
10 communication that falls within category 3.

11 Plaintiffs have not produced category 1 documents. After agreeing that such
12 communications need not be logged, Bard subsequently insisted that Plaintiffs log
13 communications from experts to attorneys that were not produced pursuant to
14 26(b)(4)(C)(i)-(iii). Plaintiffs admit that such communications exist. There are dozens (if
15 not hundreds) of communications from experts that do fall outside of the exceptions listed
16 in Rule 26(b)(4)(C)(i)-(iii). But, because those communications do not involve the
17 exceptions to the protection of expert-attorney communication, they are all categorically
18 protected from discovery under Rule 26(b)(4)(C). Individually logging those
19 communications provides no benefit in that Plaintiffs have withheld all of them for the
20 same reason, and the descriptions in a log of the basis for withholding them (Rule
21 26(b)(4)(C)) would be the same for them all. Plaintiffs have explained this to Bard’s
22 counsel, but Bard’s counsel nonetheless insists, after previously agreeing otherwise, on a
23 log that will provide no actual benefit.

24 To be clear, Plaintiffs do not make a “blanket” claim that the presence of an
25 attorney on a communication renders it protected under 26(b)(4)(C); rather, Plaintiffs’
26 counsel has reviewed the communications involving experts and produced expert-to-
27 expert communications regardless of whether attorneys were copied (CCed) on the emails.
28

1 Plaintiffs redacted (and provided a redaction log for) a single email communication
2 involving Drs. Garcia and Streiff. The basis for the redaction is that the communication
3 conveys attorney work-product information (protected under Rule 26(b)(3)(A)) that
4 Plaintiffs' counsel gave to Dr. Garcia (an expert retained by plaintiff and, thus, the
5 communication of which is protected under Rule 26(b)(4)(C)) to Dr. Streiff (another
6 expert retained by Plaintiffs and communications with which are protected under Rule
7 26(b)(4)(C)). Unlike normal attorney-expert communications, the communication of
8 attorney work product is entitled to a higher degree of protection. *See Hickman v. Taylor*,
9 329 U.S. 495, 510 (1947) ("it is essential that a lawyer work with a certain degree of
10 privacy, free from unnecessary intrusion by opposing parties and their counsel.").
11 Plaintiffs contend that this non-discoverable information did not lose its protected status
12 when conveyed from one expert retained by Plaintiffs to another expert also retained by
13 Plaintiffs.¹ Indeed, Bard's contention that such information loses its protected status
14 elevates form over substance. Plaintiffs' counsel's communications with Dr. Garcia are
15 protected; Plaintiffs' counsel's communications with Dr. Streiff are protected. The
16 conveyance from one of those experts to the other of the protected information should not
17 lose its protected status because both experts fall under Rule 26(b)(4)(C)'s protection.

18 Second, Plaintiffs disagree that they have not "sufficiently ensured" that their
19 expert's communications have been collected. Plaintiffs' counsel has had express
20 conversations with all of the experts at issue to determine what communications they had,
21 where they exist, and the best way to collect those communications.

24 ¹ *See, e.g., Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1195 (11th Cir. 2013)
25 (addressing discoverability of communications between retained experts: "To the extent
26 that any attorney core opinion work-product is embedded in the 1,200 documents at issue
27 here, Chevron and Dr. Hinchee may appropriately redact such portions"); *see also In*
28 *re Application of Republic of Ecuador v. Douglas*, 153 F. Supp. 3d 484, 491 (D. Mass.
2015) (expert's "communications with non-attorneys—including communications in
which attorneys are merely copied, *but in which no attorney work product exists*—and
notes must be provided" (emphasis added)).

- In the case of the Northwestern doctors, Bard ignores that these are four practicing physicians who work together on medical cases; they are not simply experts engaged together for expert testimony in this MDL. Plaintiffs' counsel discussed with those doctors the best way to identify responsive communications; all the doctors agreed that the attorneys at the Hausfeld firm were copied on all the relevant communications. Accordingly, rather than dig through thousands of emails between the doctors, the attorneys collected all relevant communications from all four doctors from a review of Plaintiffs' counsel's email server and then reviewed each one based on the standards and criteria set forth in 26(b)(4)(C).
- Plaintiffs asked Drs. Garcia and Streiff to produce all of their relevant emails, and the doctors have confirmed that they have done so.

Defendants' Position:

Bard believes that there are two issues outstanding: (1) whether communications "From:" an expert to another expert need to be produced or put on a privilege log even if a lawyer is a recipient of the e-mail; (2) whether the plaintiffs properly collected responsive communications from the Northwestern physicians and Dr. Garcia.

First, since early August, counsel for Bard have written and spoken to the plaintiffs' counsel multiple times about the production of a privilege log and about questions regarding the communications produced. During a meet and confer with the plaintiffs' counsel in early August, Bard agreed that communications "From:" *an attorney* to plaintiffs' experts need not be itemized on a privilege log because such communications appear to fall outside of scope of CMO-26 and appear to be protected by Rule 26(b)(4)(C). Counsel for Bard explicitly and repeatedly informed the plaintiffs multiple times in writing and on the phone that the plaintiffs should produce or log any e-mail communication "From:" an expert where another expert is a recipient of the e-mail regardless of a lawyer's presence on the e-mail. (*See* E-mails from Counsel for Bard to Counsel for Plaintiffs, Aug. 10, Aug. 11, Sept. 5, and Sept. 8, collectively attached as Exhibits A, B, C.)

1 The plaintiffs, however, make the blanket assertion that communications involving
2 a lawyer are protected under Rule 26(b)(4)(C), and appear to be claiming that they need
3 not produce a privilege log for any communications where a lawyer is somehow involved.
4 But their position ignores Case Management Order No. 26, which requires “a privilege
5 log that identifies the specific basis on which Plaintiffs’ conclude that the communications
6 are protected under Rule 26(b).” Without a privilege log, the plaintiffs cannot establish
7 that all communications involving a lawyer are protected from discovery. For example,
8 while a communication “From:” an expert “To:” both a lawyer and another expert might
9 properly be withheld under Rule 26(b)(4)(C) if the content of the communication is
10 directed to a lawyer, the communication might be discoverable if the content of the
11 communication is directed to the other expert. Only a privilege log, per the Court’s Case
12 Management Order, can allow Bard to assess the validity of the privilege claim.

13 Second, the plaintiffs have not sufficiently ensured that all responsive
14 communications between their experts were collected and produced. The plaintiffs appear
15 to have used a scattershot approach to locate e-mails from their experts, as opposed to
16 simply requiring the experts to produce to them all of their communications regarding this
17 matter so the plaintiffs’ attorneys could either produce them or place them on a log. From
18 the e-mail communications that the plaintiffs produced, the Northwestern physicians
19 appear to have used e-mail addresses at both @northwestern.edu and @nw.org. Despite
20 multiple requests from Bard, the plaintiffs have not confirmed that both e-mail domains
21 were searched for all four Northwestern physicians. Rather, the plaintiffs specifically
22 state that in regard to communications between all four Northwestern doctors (Drs.
23 Vogelzang, Desai, Resnick, and Lewandowski), they relied on the doctors’ representations
24 that all “written communications among them” about the litigation included an attorney
25 and thus they limited their search for responsive communications to “a review of
26 Plaintiffs’ counsel’s email server.” But the plaintiffs produced an e-mail solely between
27 these four physicians that did not involve counsel, so a search of plaintiffs’ counsel’s
28 servers based on a representation from the physicians is demonstrably insufficient.

1 Additionally, the plaintiffs state that they asked Drs. Vogelzang and Desai to
2 “identify” their “relevant” emails, but it does not appear that all of the e-mails were
3 collected and analyzed by counsel. Instead, the plaintiffs relied on the representations of
4 these doctors that all relevant e-mails were provided.

5 Similarly, Dr. Garcia used e-mail addresses at both @uw.edu and @gmail.com, but
6 the plaintiffs have not confirmed that both e-mail domains were searched for responsive
7 communications. Instead, the plaintiffs limited their production to confirmation from the
8 doctors that “all of their relevant emails” have been produced. Bard has simply requested
9 confirmation that both of Dr. Garcia’s e-mail domains were searched for responsive
10 communications, but the plaintiffs have not done so.

11 Bard requests that the Court reiterate its order that the plaintiffs to produce a
12 privilege log by a date certain for all communications “From:” an expert where another
13 expert is a recipient regardless of the presence of a lawyer on the communication. Bard
14 also requests that the Court order the plaintiffs to meet and confer with Bard regarding the
15 collection and production of e-mails from the various e-mail domains used by the
16 Northwestern physicians and Dr. Garcia.

17 **VI. Miscellaneous Pending Motions**

18 A. Dr. Henry Deposition in Hyde Case

19 In CMO 26, the Court required the parties to file by July 28, 2017, memoranda
20 addressing various issues relating whether Dr. Henry should be re-deposed. Those
21 submissions have been made [Docs. 7027 & 7028]. The Parties will be prepared to
22 address questions the Court may have, if any, relating to that motion at the upcoming
23 status conference.

24 B. Motion to Disqualify Thomas Kinney, M.D., as an Expert for Plaintiffs

25 Defendants’ Motion to disqualify one of the plaintiffs' experts, Dr. Thomas Kinney
26 [Doc. 5677], has been filed and is fully briefed. The Parties will be prepared to address
27 questions the Court may have, if any, relating to that motion at the upcoming status
28 conference.

C. Motion to Disqualify Plaintiffs' Experts Drs. Vogelzang and Desai as Testifying Experts and Drs. Resnick and Lewandowski as Consulting Experts for Plaintiffs

Defendants' motion to disqualify Drs. Vogelzang and Desai as Testifying Experts and Drs. Resnick and Lewandowski as Consulting Experts for Plaintiffs [Doc. 6678] has been filed and is fully briefed. The Parties will be prepared to address questions the Court may have, if any, relating to that motion at the upcoming status conference.

Respectfully submitted this 28th day of September 2017.

GALLAGHER & KENNEDY, P.A.

SNELL & WILMER L.L.P.

By: s/ Paul L. Stoller

Mark S. O'Connor (011029)
Paul L. Stoller (016773)
2575 East Camelback Road
Phoenix, Arizona 85016-9225

Ramon Rossi Lopez
(admitted *pro hac vice*)
CA Bar No. 86361
LOPEZ McHUGH LLP
100 Bayview Circle, Suite 5600
Newport Beach, California 92660
Attorneys for Plaintiffs

By: s/ Richard B. North

James R. Condo (005867)
Amanda C. Sheridan (027360)
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

Richard B. North, Jr. (admitted *pro hac vice*)
Georgia Bar No. 545599
Matthew B. Lerner (admitted *pro hac vice*)
Georgia Bar No. 446986
Nelson Mullins Riley & Scarborough LLP
201 17th Street, NW / Suite 1700
Atlanta, GA 30363

Attorneys for C. R. Bard, Inc. and Bard Peripheral Vascular, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/ Deborah Yanazzo